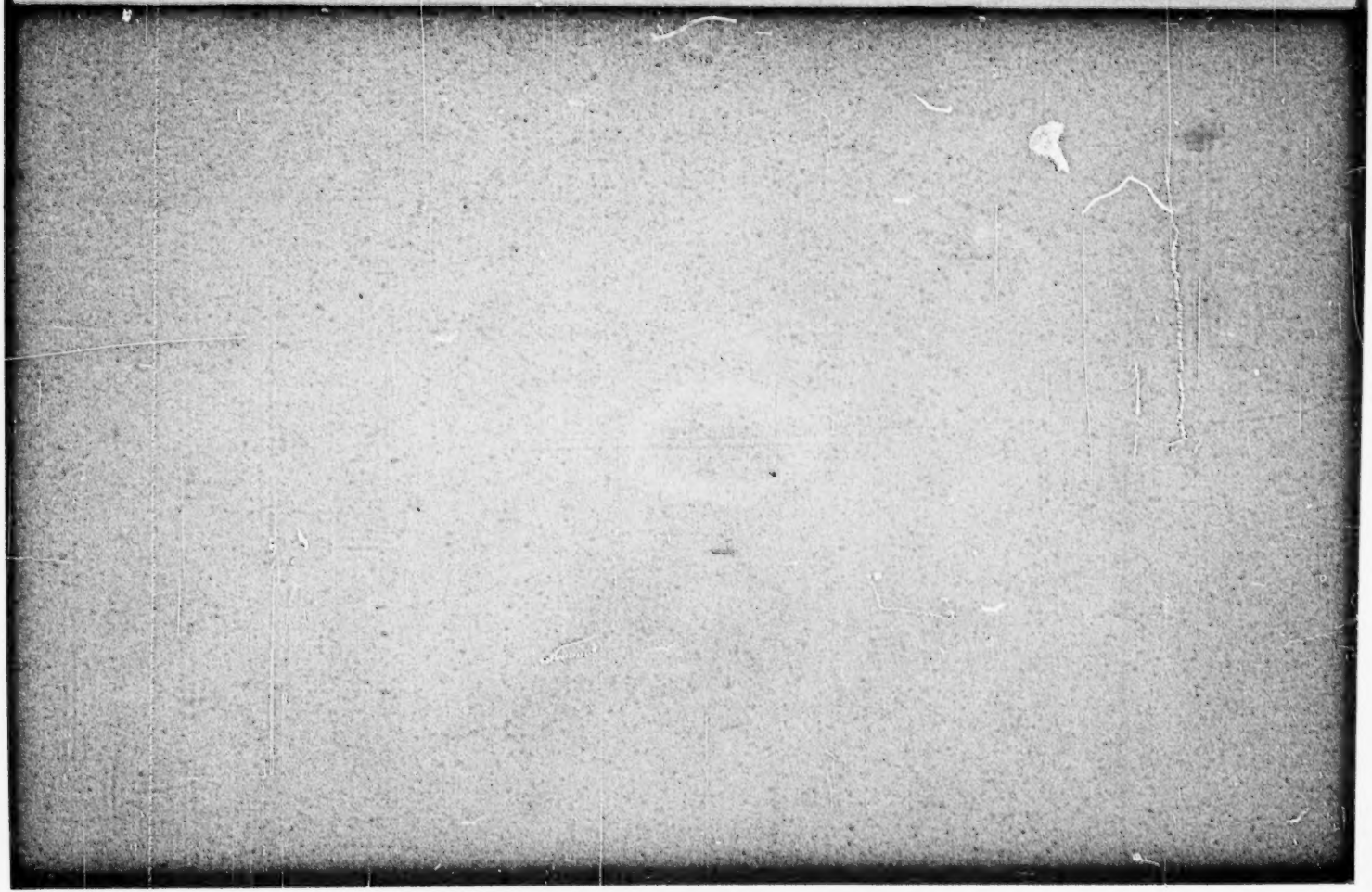

SUPREME COURT, U. S.

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1676

ALBERT J. WAHBA,

Petitioner,

vs.

NEW YORK UNIVERSITY and SEVERO OCHOA,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. B of Petition) is reported at — F. Supp. —. The opinion of the United States Court of Appeals for the Second Circuit (App. A of Petition) is reported at 492 F. 2d 96.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 11, 1974, affirming the judgment of the United States District Court for the Southern District of New York entered on July 25, 1973 granting respondents' motion for summary judgment. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Question Presented

Where a non-tenured professor at a private university performs work on another professor's scientific research project, does he have to be granted a hearing under the due process clause of the Fifth Amendment to the Constitution

(a) before the professor in charge of the project may refuse to allow him to perform further work on the project, or

(b) before the university may refuse to renew his contract of employment,

where the sole ground of Federal involvement is claimed to arise because the research in question is partially supported by Federal grant funds.

Statement of Facts

This litigation concerns the actions taken by respondents, Severo Ochoa and New York University ("N.Y.U."), in removing petitioner from work on a Federal government-supported research project conducted at N.Y.U. and not renewing his contract of employment at that institution.

The basic facts are not in dispute. Indeed, petitioner rests on the factual data provided in the affidavits of employees of respondent, New York University, insofar as the claim of "state action" is involved.

From 1963 to 1969 petitioner was an untenured faculty member, working under a succession of one-year contracts, of the Department of Biochemistry of the School of Medicine, a division of N.Y.U.—concededly a private educational

institution in the City of New York chartered by the State of New York.

Respondent, Ochoa, is Chairman of the Department of Biochemistry of the School of Medicine. He is an internationally renowned scientist, and recipient of the Nobel Prize awarded to him for the early part of the scientific research which is the subject of this action.

Beginning in 1957, Ochoa was designated as "principal investigator" under a series of research support grants made by the National Institutes of Health ("N.I.H."). Under these grants, the Federal government provided funds for the conduct of original pure research in biochemistry at N.Y.U., which was designated as the "grantee institution" under these N.I.H. grants. The grants were made for a study entitled "Enzymic Mechanisms in Biosynthesis" which involved the investigation of problems of fundamental biological importance in a pure research area dealing with the origination of life mechanisms. (88a) The grant has been funded on a yearly basis from 1957 through and including the present.

Funds were made available under the grants to pay all or part of the salaries of certain technical personnel working on the project, other than petitioner and respondent, Ochoa. The salaries of neither were paid out of those grants. (70a and 178a) While part of the grant funds were used to purchase specialized equipment and supplies for the research (72a and 182a), N.Y.U. contributed approximately 12,000 square feet of laboratory and associated space, its own equipment and facilities for processing bacterial cultures, etc. and all the day to day environ-

ment of a private university department devoted to teaching and research activity.

The applicable Regulations of the Department of Health, Education and Welfare ("H.E.W.") (90a), the Policy Statement of that Department covering research support grants (213a) and the practices of N.I.H. (56a and 247a) make it clear that these grants were issued to help support work in pure research performed at N.Y.U. by the principal investigator or by others under his supervision and direction. In issuing the grants, N.I.H. relied upon Professor Ochoa's knowledge, experience and standing in the scientific community. (57a)

N.I.H. exercised no control or oversight over the research work itself or its supervision by Ochoa. In particular, it exercised no control or supervision over or had any involvement in Ochoa's decisions with regard to the persons who were to perform the research work at any level. (63a, 64a, 67a) It did not require any reports when new personnel were hired or existing personnel were terminated during the course of the grant year, nor did it in any manner authorize, encourage or participate in Ochoa's decisions regarding changes in staff personnel. (64a, 65a-66a, 68a) What it sought was Ochoa's statement of research goals and objectives for the project, work in furtherance of those goals and objectives, and his continuation as principal investigator under the grant project. (57a) As with all pure research in the physical sciences, no performance result could be guaranteed and, indeed, no one could be assured that any of the facts "discovered" in the conduct of any experiment would be of practical value to any one except as it added to the sum of knowledge of a small group of highly educated scientists. Lines of research

to pursue, experiments to abandon, areas of investigation to emphasize, and judgments on the validity of the "facts" discovered, were all matters peculiarly within control of Professor Ochoa as principal investigator. N.Y.U., as grantee institution, was required to administer the fiscal and record-keeping aspects of the grant. (64a-65a) However, it too exercised no control over the research or the persons performing work under Ochoa's direction.

Petitioner performed research work on the grant commencing in 1963. In 1969 petitioner submitted a manuscript for publication reporting on research work done under the grant by himself and various other colleagues who worked on the grant project. Ochoa objected to publication of the manuscript, primarily because, contrary to his long standing rule which was known to petitioner, the manuscript had not been submitted to him in advance for review and approval. Ochoa told petitioner to withdraw the manuscript and when he refused, Ochoa informed petitioner that he would no longer be permitted to work with him on the research grant project. However, petitioner suffered no monetary loss since N.Y.U. continued to pay petitioner's salary. Several months later, N.Y.U. notified petitioner that his one year appointment, then due to expire in approximately ten months, would not be renewed. In March, 1970, N.Y.U. learned that, commencing in January, 1970, petitioner had taken a position at another university at almost twice his salary at N.Y.U. It then ceased further salary payments. The overpayment of two months salary is the subject of N.Y.U.'s counterclaim still pending in the District Court. (10a)

When petitioner instituted this action, he based his right to recover punitive damages in the amount of $250,000 on

respondents' alleged violation of his rights secured by the First, Fifth, Ninth and Fourteenth Amendments to the Federal Constitution. (Compl. ¶¶ 24-25, 16a-17a) By oral representation to the District Court, however, petitioner withdrew all claims to recovery under Amendments other than the First and Fifth Amendments. The litigation below has dealt only with whether petitioner's action states a claim under those Amendments. Essentially, petitioner alleges that the relationship created by the research support grant sufficiently involved the Federal government in the actions of respondents in removing petitioner from work on the grant project and in failing to renew his contract so as to subject them to the constraints of the First and Fifth Amendments.

Respondents moved for summary judgment. The District Court held that the facts presented, viewed in the light most favorable to petitioner, did not support a finding that the conduct of respondents constituted government action and granted judgment dismissing the complaint. The Court of Appeals affirmed that judgment.

ARGUMENT

POINT I

The Decision Below is Clearly Correct.

The decision of the Court of Appeals for the Second Circuit is correct and further review by this Court is unwarranted. The issue of governmental action presented by this case is narrowly limited to a particular set of facts on which there is no significant dispute between the parties.

Petitioner has asserted no conflict between the decision of the Court of Appeals in this action and the decision of any other Court of Appeals. Clearly, this case presents no conflict with the decisions of other courts.

As the Court of Appeals noted in its decision, the contours of the concept of governmental action have eluded precise definition by the Courts. In the absence of decisive case law defining governmental action in the context of Federal research grants to private persons, the Court was faced with the task of applying Mr. Justice Clark's formula of "sifting facts and weighing circumstances" to determine whether government action is present. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

The Court of Appeals gave full consideration to the factual nature of the relationship between respondents and the Federal government arising from the research support grants in question. Federal funds were used to "prime the pump" of research efforts at a private scientific institution which the government could not perform as well. The principal investigator of the project, respondent Ochoa, was responsible for the scientific and technical direction of the project. If he should cease to serve in that capacity the grant would end. The form and manner of publication of results were left entirely in private hands.

It further correctly observed that petitioner's salary was not paid out of these grant funds. These funds were used to pay the salaries of certain other research personnel, to cover certain itemized expenses and, to a limited extent, to cover some of the indirect costs of the project. It also noted that respondent, N.Y.U., received no payment from the grant for the services of other personnel working on the

grant project and the use of its facilities (other than as covered by the reimbursement for 20% of indirect costs). The Court was manifestly right in observing:

> "The research was thus a project of the Biochemistry Department of the New York University School of Medicine carried on with the collaboration of a number of University-paid personnel and on University facilities." (App. A, 7a)

While undertaken with some government support, the research project in question was that of respondents. As the Court below noted, it was not in any sense of the word a joint venture or partnership between the government and private persons. N.I.H. neither desired nor did it in fact share responsibility for administration of the research. These responsibilities were purposefully left in private hands.

Moreover, this is clearly not a case where the Federal government has merely chosen to permit private individuals and institutions to operate a public agency. Cf. *Kerr* v. *Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945) On the contrary, this case involves a private pure research project conducted at private facilities, directed by private persons, with partial public funding. On the basis of these "facts" and "circumstances", the Court of Appeals rightly concluded that the requisite governmental involvement in the acts in question was not present in this case. In reaching its conclusion, the Court below was fully supported by numerous cases involving different facts which have clearly established the principle that there must be involvement by the government in the challenged acts.

There must be a clear and direct nexus between the governmental involvement and the alleged wrongful act before governmental presence in the act will be found. *Jackson* v. *Norton-Children's Hosps., Inc.*, 487 F.2d 502 (6th Cir. 1973); *Doe* v. *Bellin Mem. Hosp.*, 479 F.2d 756 (7th Cir. 1973); *Grafton* v. *Brooklyn Law School*, 478 F.2d 1137 (2nd Cir. 1973); *Ward* v. *St. Anthony Hosp.*, 476 F.2d 671 (10th Cir. 1973); *Millenson* v. *New Hotel Monteleone*, Inc., 475 F.2d 736 (5th Cir. 1973), *cert. denied*, —U.S. — (1973); *Bright* v. *Isenbarger*, 445 F.2d 412 (7th Cir. 1971); *Blackburn* v. *Fisk University*, 443 F.2d 121 (6th Cir. 1971); *Coleman* v. *Wagner College*, 429 F.2d 1120 (2nd Cir. 1970); *Browns* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Powe* v. *Miles*, 407 F.2d 73 (2nd Cir. 1968); *Mulvihill* v. *Julia L. Butterfield Mem. Hosp.*, 329 F. Supp. 1020 (S.D.N.Y. 1971); *Grossner* v. *Board of Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968)

Indeed, this Court has held that mere generalized government involvement in the acts of otherwise private persons and institutions does not, in and of itself, render such acts those of the government. On the contrary, the government must be involved in the very conduct challenged by petitioner. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972)

Petitioner can point to no statute, no regulation, no rule and no practice by which the Department of Health, Education and Welfare directed, encouraged, fostered or influenced in any way any activity by either respondent relating to personnel who would do research on the grant under Ochoa's direction or requiring any conduct by N.Y.U. regarding personnel to be appointed to any position.

The government knew how to be definite on the subject of exclusion of persons from participation on a Federal grant project on the basis of race, creed, color or national origin. It stated in bold type on the face of its Policy Statement (214a) that such discrimination under programs and activities receiving Federal financial assistance was prohibited by the Civil Rights Act of 1964. No claim of such discrimination is made here. As noted by the Court below, this specification affords some indication that the government did not require compliance with other constitutional guarantees.

As set forth in the record below (56a), N.I.H. exercises no supervision or control over or involvement in the technical, scientific and other operational aspects of research work conducted with the support of its research grants. In particular, N.I.H. leaves all decisions relating to the supervision, control and assignment of research responsibilities to personnel working on grant projects to the principal investigator, in the first instance, and, ultimately, to the grantee institution. (63a, 64a, 66a, 67a) The policy and practice of N.I.H. in this regard are dictated by and are consistent with the underlying concept of the research support grants program, which is non-interference with the conduct of pure research work at non-profit institutions, such as N.Y.U., receiving such grants. (63a-64a, 66a) The sole concern of N.I.H. and the Federal government with respect to such research is that the funds granted be spent in furtherance of the general research objectives of the project. (65a, 66a) Thus, essentially all matters other than supervision of the fiscal administration of the project are left in the hands of private individuals and institutions. Once having selected the principal investigator and grantee

institution on the basis of demonstrated capacity and competence to carry on research, N.I.H. does not thereafter intervene in such matters as personnel decisions. (64a-65a, 67a)

Measured against the decisions of this Court and the lower Federal courts, the decision of respondent Ochoa, not to permit petitioner to continue work on the research project and of respondent, N.Y.U., not to renew his contract were not in any respect governmental in nature.

Petitioner urges that since Ochoa deemed himself responsible for all research results published under the grant and included in that area a responsibility to the granting agency, his act in disapproving petitioner's manuscript was that of a Federal officer. (Pet. p. 12)

Respondents concede that a conscientious scientist such as Ochoa deems himself responsible to the entire scientific world, including the government agency, for the truth of all reports of scientific research conducted by him or under his supervision. However, the issue is not what Ochoa may have thought, since courts ordinarily are ". . . loath to suggest that state action can arise from a private individual's mistaken notion that his acts have the imprimatur of the state", *Coleman* v. *Wagner College*, *supra*, p. 1125, but rather whether Ochoa was actually possessed of governmental authority on the subject on which he acted. Cf. *Griffin* v. *Maryland*, 378 U.S. 130, 135 (1963)

With regard to Ochoa's actual responsibility to H.E.W. for the contents of publications reporting on research conducted under the grant, the government made it clear that he had no responsibility to it. Not only does the H.E.W. Policy Statement provide that the government's approval is not required for publication of scientific results, but, in-

deed, it contains a direction that the research should not be ascribed to it. (225a)

In short, H.E.W. very wisely left this highly personal and subjective area of publication, involving as it does delicate and intangible values of style, format, footnoting and scientific merit, entirely to the personal views of the principal investigator. (68a) His prestige, career and sense of responsibility to his select audience of scientific peers are the real safeguards against publication of not merely inaccurate, but shoddy and even inelegant reports. In the case at bar, Ochoa's application of his standards to a proposed publication of scientific results by one doing research under his supervision has produced this controversy. In other circumstances, the application of those standards produced research publications resulting in the Nobel Prize.

The Court below also correctly recognized the existence of significant policy reasons for not encrusting the conduct of pure research at private institutions with the full panoply of due process requirements applicable to government institutions. As the Court stated:

> "Only rarely are professors of Dr. Ochoa's eminence willing to enter government service in peacetime. It is equally clear that scientists of his reputation on the staffs of private institutions, with a wealth of choices before them, are not likely to be willing to undertake projects under public grants if they are deprived of the freedom of management which they consider necessary and would have in projects not governmentally financed. It is hardly an attractive prospect for a research scientist to be forced to divert time from scientific inquiry to appear before a court or even a university board to justify such decisions as his refusal to allow a participant in his research project to make what he considers a pre-

> mature and ill-advised publication;[6] [footnote omitted] even less inviting is the prospect that the hearing board, in construing what it deems to be its constitutional mandate, may require him to allow such publication." (App. A, 12a-13a)

The value of preserving a private sector free from constitutional requirements is well established and in the academic field of education and its handmaiden of pure research that tradition is particularly well documented. *Greene* v. *Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *rev'd on other grounds*, 412 F. 2d 1128 (D.C. Cir. 1969); *Roth* v. *Board of Regents*, 310 F. Supp. 972 (W.D. Wisc. 1970), *rev'd on other grounds*, 408 U.S. 564 (1972)

It should be clear from the foregoing that this case represents merely another of the ever increasing attempts to get into the Federal Court by labelling real or imagined wrongs as deprivations of rights under the Constitution. *Place* v. *Shepherd*, 446 F. 2d 1239 (6th Cir. 1971) Petitioner's claim of wrong—if there was a wrong—is not a claim directed at any governmental action. It is directed solely at Ochoa and N.Y.U. Its roots reside in pique and not in any Federal exercise of power.

The complaint was properly dismissed for lack of any Federal involvement in the actions complained of by petitioner and further review by this Court is unwarranted.

POINT II

There is No Important Question of Federal Law.

Petitioner cites no overriding questions of Federal law presented by the instant case as would warrant this Court to grant his petition. Plainly, this is so because none exist.

As the Court of Appeals pointed out, this case presents "another variation on the pervasive theme of what constitutes government action." (App. A, 2a) As noted by Mr. Justice Clark in *Burton, supra*, at 726, the relationships between government and private persons today are so multitudinous that a determination of those otherwise private actions which are embraced within the area of "state action" is "peculiarly dependent" on the framework of the particular facts and circumstances presented in each case. That framework was well explored in both the District Court and the Court of Appeals after both sides had completed their discovery, and additions to an already full record would add nothing but redundancy to the papers on file.

Thus, this case does not present any issue of Federal law, but rather the application of unique and particular facts, which are not in dispute, to that law. The Court below fully considered the facts and concluded that they do not rise to the level of state action. Its decision based on those facts cannot be converted into an important question of Federal law and does not warrant further review.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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